Supreme Court, U.S.
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No. 98-1867

In The

Supreme Court of the United States

FRED DAVIS,

Petitioner,

v.

ANTHONY LAURIA,

Respondent.

On Petition For Writ Of Certiorari To The Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

GEORGE R. SUSLAK
Counsel of Record
STANTON & LANG
P.O. Box 1080
200 Broadway
Lynnfield, MA 01940
(781) 595-1440

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW

The Petitioner, in his writ of Certiorari, has presented seven (7) issues for this Court to review. Respondent maintains that none of the questions presented merits this Court's review. Issues II, IV, V, VI and VII do not even mention a federal question or a constitutional issue. Those purported issues that at least mention the Constitution (i.e., Issues I and III) do so in such an unspecified, incomprehensible manner that no "compelling reason" for review by this Court – as stated in Rule 10 of the United States Supreme Court Rules – is even remotely presented.

Importantly, the Massachusetts Appeals Court held that "principles of res judicata preclude the plaintiff from asserting that there was no settlement of this action by our decision in *Davis v. Hanover Ins. Co.*, 40 Mass.App.Ct. 1127 (1996), cert. denied, 117 S.Ct. 685 (1997), and thus retransfer to the Superior Court would be futile" [see App. 24].

Therefore, and regardless of Petitioner's strained and contrived issues, there was an independent and entirely state-based foundation for the state disposition of this case. "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); quoted in *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

More specifically, the Petition, on its face, fails to identify any "important federal question" or "important

RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW – Continued

question of federal law", within the meaning of said Rule 10(b) or (c):

1. In Issue I, Petitioner makes a virtually unintelligible argument about some amorphous "Constitutional Rights" of the "disabled, partial disabled, pro se litigants and minorities". Even if these issues were properly raised and argued in the Petition, they would not be properly before this Court since that was not the issue before the state courts and that issue, quite properly, was not passed upon by those courts.

2. In Issue II, Petitioner makes an even more unintelligible and incoherent argument presumably concerning "stealing monies from the petitioner". The Petitioner has failed to identify what specific statute is to be reviewed by this Court and by what authority this Court could review the matter. Further, this issue was not raised before either the Massachusetts Appeals Court or the Massachusetts Supreme Judicial Court. Lastly, Petitioner's vague allegations, such as they are, are directed at Hanover Insurance Company and its counsel, neither of whom are parties to this action. Despite Petitioner's inclusion of Hanover Insurance Company as a defendant on the cover sheet to his Petition to this Court, Hanover is not and never has been a party to this action, nor has its counsel, George R. Suslak ("Suslak").

3. In Issue III, Petitioner makes what appears to be a "due process" argument concerning what he suggests was "an incorrect docket sheet entry". Petitioner alleges that the docket sheet inaccurately noted that his claim

RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW – Continued

had settled. Petitioner denies having ever settled the underlying tort claim against Mr. Lauria. Even if this were true (which Respondent vigorously disputes below), by the time the issue was raised, the Massachusetts Appeals Court had confirmed that the settlement was valid, which rendered Petitioner's argument in this case "futile" under state principles of res judicata [see App. 24]. Thus, there is no federal or constitutional question appropriate for review by this Court.

4. In Issue IV, Petitioner makes essentially the same argument as in Issue III – i.e., that "petitioner was not notified by the court that his action was reported settled". This issue is not appropriate for review by this Court for the same reasons noted above.

5. In Issues V and VI, Petitioner makes vague allegations against Hanover Insurance concerning alleged violations of M.G.L. c. 93A (the Massachusetts Consumer Protection Act) and M.G.L. c. 19A, § 14 (defining what is "financial exploitation" of the elderly). Even if there were a scintilla of a basis for these allegations (which there clearly is not), they are merely interpretations and applications of state law which raise no "important federal question of law" appropriate for review by this Court.

6. In Issue VII, Petitioner makes scurrilous and unfounded allegations concerning George R. Suslak (hereinafter "Suslak"). Suslak is not,

RESPONDENT'S OBJECTIONS TO THE QUESTIONS PRESENTED FOR REVIEW – Continued

and never has been, a party to this action. Nevertheless, any issue of alleged attorney misconduct in a state court proceeding is not an appropriate matter for review by this Court.

LIST OF PARTIES TO THE PROCEEDINGS

Fred Davis is the plaintiff in this matter. The only defendant is Anthony Lauria.

All orders and decisions of the Massachusetts Courts have (properly) listed the defendant in this matter as "Anthony Lauria" [App. 1; App. 11; App. 22; App. 24; and App. 36], despite Petitioner's unceasing attempts to list Hanover Insurance as a Respondent in this matter [see cover sheet to Petitioner's Brief; pgs. 3, 6, 9-10 of Petitioner's Brief; and App. 26 attached hereto]. Also, as noted above, Suslak never has been a defendant in this matter, despite Petitioner's constant references to him [see Petition, pgs. 1, 3, 4, 6, 8, 11-12].

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Davis v. Lauria, 46 Mass.App.Ct. 1112 (1999); unreported Memorandum of Decision at App. 24.

Davis v. Lauria, Massachusetts Supreme Judicial Court denial of Further Appellate Review Application; unreported; see App. 36.

CONCISE STATEMENT OF JURISDICTION

Petitioner states that "[t]his Court's jurisdiction is invoked under 28 United States Code" [Petitioner's Br., p. 2]. This assertion of jurisdiction is overly vague and does not comply with Rule 14(1)(e) of the United States Supreme Court Rules. It is assumed that the Petitioner is claiming that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), however, § 1257(a) applies, at best, only to Issue III.

Regarding Petitioner's Issue I, although he has made some vague allegation about due process and equal protection, he has not even identified which constitutional provisions he is referring to, nor has he indicated whether he is referring to the United States or to the Massachusetts constitution.

Petitioner's Issues II, IV, V, VI and VII do not even remotely resemble the types of questions identified in § 1257(a) that call for review by this Court.

Although Petitioner's Issue III invokes United States Constitution Amendments V and IV, he provides no indication as to how those provisions are implicated. Also, there are other compelling reasons, set forth below, why this Court should refuse to accept jurisdiction over this issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no federal statutory provisions involved in this matter. The only United States Constitution provisions noted by Petitioner are:

> *Amendment Article V.* "No person shall . . . be deprived of . . . property without due process of law".
>
> *Amendment Article XIV.* "[N]or shall any state deprive any person of . . . property, without due process of law, nor deny to any person . . . the equal protection of the laws."

CONCISE STATEMENT OF THE CASE

This is now the third time that this Petitioner has sought relief from this Court in this and directly related matters. See United States Supreme Court Docket Nos. 96-640 and 96-1074.

In its most simplified form, the instant matter merely presents a state law related procedural question: under Massachusetts law, is a party entitled to a retransfer of a matter from the Boston Municipal Court to the Suffolk Superior Court more than six (6) years after the matter has been reported settled, and after an Appeals Court opinion which has confirmed the settlement of the matter?

The case stems from a 1987 motor vehicle accident between the Petitioner, Fred Davis ("Petitioner"), and Anthony Lauria, who was insured under an automobile insurance policy by Hanover Insurance Company ("Hanover"). Petitioner brought his action against Lauria in the Suffolk County Superior Court. Under Massachusetts law, the case was remanded to the Boston Municipal Court ("BMC") for trial. The case was reported settled by the parties on October 9, 1991 [See App. 5], and a "NISI order" entered the same day, indicating, in effect, that the case would be dismissed as to all claims on November 12, 1991.[1]

A settlement for $20,000 was arrived at between Petitioner's lawyer (Robert Adams) and Hanover. Prior to consummation of the settlement, it was discovered that Petitioner's prior lawyer (Stuart Ravech) had served the parties with a notice of attorney's lien [see App. 5]. At that point, appropriately so and in accordance with Massachusetts law, Hanover insisted that any settlement draft include the name of Petitioner's prior lawyer (Ravech).

---

[1] The 30-day Nisi period expired on November 19, 1991 (which was a Saturday), and the following Monday (November 11) was a holiday.

Petitioner then refused to accept the settlement funds and has since filed a series of frivolous lawsuits and appeals in an attempt to obtain the settlement proceeds while escaping the attorney's lien. Hanover's position in this matter (essentially that, under Massachusetts law, it had an obligation to protect the attorney's lien) has been vindicated at every turn.

Petitioner then brought an action in Norfolk County Superior Court directly against Hanover alleging breach of the settlement agreement, unspecified violations of M.G.L. c. 93A, and unintelligible and unspecified violations of Petitioner's rights as a senior citizen. Hanover moved for summary judgment on the issue of its obligation to honor the attorney's lien. The motion for summary judgment was allowed "in its totality" by the trial court [App. 37]. That ruling was upheld at the Appeals Court [App. 39], and at the Supreme Judicial Court [App. 40]. Certiorari was denied by this Court in 96-640 [App. 41], as was Petitioner's Motion for Rehearing [App. 42].

The Norfolk County Superior Court decision is central here because that summary judgment held that there was no breach of the settlement agreement by Hanover – and it is that holding which formed the basis for the Appeals Court's application of res judicata principles to the instant case [see App. 24]. Thus, the Appeals Court, in the instant matter, was merely holding that Petitioner cannot resurrect an already decided issue. Further, and as noted above, the decision by the Appeals Court in the instant case, based on principles of res judicata, provides the "separate, adequate, and independent grounds" for the state court disposition which effectively precludes review by this Court.

While that matter was pending, Petitioner filed a complaint in the United States District Court for the District of Massachusetts (Civil Action No. 95-11837MLW) against Hanover and its Chairman of the Board, alleging various state and federal constitutional violations as a result of Hanover's insistence that it honor the attorney's lien. Petitioner also alleged that the Superior Court judge and Hanover's attorney would not allow the record to be assembled in the original case, thereby depriving him of his right to appeal. This complaint was dismissed by the District Court, on Hanover's Motion to Dismiss [App. 43]. This dismissal was upheld by the First Circuit Court of Appeals [App. 47]; and this Court denied Petitioner's Petition for a Writ of Certiorari [App. 49] and then denied a motion for rehearing [App. 50].

It was at this point that Petitioner sought to revive the original lawsuit filed against Lauria (that had been reported settled in 1991). He first sought to remove the original dismissal of that action in the BMC [App. 9]. This Motion was denied [App. 11]. After the matter had been inadvertently retransferred to the Superior Court, defendant filed a Motion to Vacate that Retransfer [App. 13], and Petitioner filed an Opposition to that Motion [App. 18]. The Suffolk Superior Court allowed defendant's motion to vacate retransfer [App. 22]. The Petitioner appealed the Superior Court Order. The Massachusetts Appeals Court entered a Memorandum and Order affirming the Superior Court [App. 24]. The Petitioner sought leave to obtain further appellate review from the Massachusetts Supreme Judicial Court [App. 26], and this Application was denied [App. 36].

It is from this proceeding that Petitioner now seeks review in this Court on a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Within the meaning of *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), there were "separate, adequate, and independent grounds" to support the state court decision in this matter, which precludes this Court from review of same.

Petitioner's Issues II, IV, V, VI, and VII do not involve federal or constitutional questions at all. The other Issues (I and III) raise no important federal question.

The case merely involves a narrow procedural question of state law concerning whether a party may revive a retransfer of a case back to the Superior Court six years after the case was reported settled. Further, the vague constitutional questions that Petitioner seeks to invoke were never raised or decided at the state court level.

Regarding Issue I, Petitioner has not identified any question appropriate for review by this Court.

Regarding Issues II, V and VI, Petitioner raised issues that: (1) lie, if at all, against Suslak and Hanover Insurance, neither of whom are parties to this case; and (2) have been resolved against Petitioner in at least two other, separate actions.

Regarding Issue III, Petitioner never raised this issue before the state courts; it does not involve any important question of federal law; and Petitioner had full and

proper notice of all proceedings before the Massachusetts courts.

Regarding Issue IV, Certiorari is not appropriate merely for alleged errors by state courts in their decisions; nor is it appropriate for resolving alleged misconduct by attorneys.

Regarding Issue VII, Petitioner's incessant personal attacks on Suslak are blatantly untrue; they are not appropriate for resolution by this Court; and petitioner should be admonished not to bring any further action against Lauria, Hanover or Suslak in the federal courts which springs from the same series of events that underlie the instant matter.

ARGUMENT FOR DENIAL OF PETITION

This particular case is, in its essence, a procedural matter. It involved the singular question whether Petitioner had the right to obtain a retransfer of this matter to the Superior Court some six (6) years after the matter was reported settled by the parties. As noted above, the validity of that settlement has been upheld by every court to which this issue was presented, including this Court [App. 38-42]. Whether the Superior Court properly vacated the retransfer of this claim is the only true issue in the instant case, yet this issue has been entirely ignored by the Petitioner throughout this appellate process.

Under Massachusetts law (M.G.L. c. 231, § 102C), a request for a retransfer "shall be filed with the clerk of

the district court within ten days after notice of the finding or decision". The Suffolk County Superior Court quite properly vacated the retransfer, holding that "[t]he [Petitioner's] right to obtain that retransfer ended on November 22, 1991, i.e., ten days after the case was dismissed in the Boston Municipal Court on November 12, 1991" [App. 22]. That Court Order further noted that "plaintiff cannot revive this old case by seeking retransfer many years after it's [sic] life ended, and the right to claim retransfer ran out in the Boston Municipal Court" [ibid.]. The case, therefore, presents no federal question appropriate for this Court's review.

Additionally, the Petitioner's purported constitutional questions, which he now attempts to raise in his Issues I and III, were never even tangentially raised at the trial court, at the Appeals Court or at the Supreme Judicial Court of Massachusetts, despite the fact that the Petitioner now acknowledges that he was aware of the issue (i.e., the entry of the report of settlement) while the matter was still at the Boston Municipal Court [see Petitioner's Brief, p. 8].

The following is a verbatim STATEMENT OF THE ISSUES PRESENTED FOR REVIEW taken from Petitioner's Brief to the Massachusetts Appeals Court:

> 1. The court erred in vacating retransfer to the Superior Court.
>
> 2. The acts and practices of the defendant, Hanover Insurance Company were unfair and deceptive within the meaning of M.G.L. c. 93A.

> 3. The court erred in not placing punishment against the defendants for violation [sic] Massachusetts General Laws Chapter 19A § 14, 'Financial Exploitation' against an elderly person.
>
> 4. The court erred in not placing Sanctions Against George R. Suslak For Telling Falsehoods to the Court.

Thus, the only issues which could even remotely invoke this Court's jurisdiction (Petitioner's Issues I and III) were not raised or decided in the state court. "If the question was not so presented, then we have no power to consider it." *Street v. New York*, 394 U.S. 576, 582 (1969). When a petitioner does not raise his constitutional issues below, and when the state courts do not address those issues, they will not be considered by the Supreme Court on Certiorari. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Adams v. Robertson*, 520 U.S. 83 (1997). It is abundantly obvious that Petitioner has only lately contrived his federal constitutional issues in an attempt to bestow some federal jurisdiction upon what has always been strictly and singularly a state court matter.

Lastly, none of Petitioner's purported substantive issues (concerning Chapter 93A and Chapter 19A, § 14, of the Massachusetts General Laws) were even addressed by the state courts in this matter at any level since they were all immaterial to the underlying nature of the case – i.e., whether Petitioner had a right to revive this matter under the procedural rules of the Commonwealth of Massachusetts. The purported substantive issues were not appropriate for determination in this matter; and they were all raised, and decided against Petitioner, in other

cases in which he did raise them. Petitioner has had his day in court on each of the collateral issues which he inappropriately tries to inject into this case.

ISSUE I

Petitioner Did Not Raise This Issue At The State Court Level; Petitioner Has Not Complied With Supreme Court Rule 14

As noted above, neither Issue I nor Issue III was ever raised by Petitioner at any level of the state court proceedings.

Substantively, in Issue I, Petitioner makes some overly vague allegations concerning the constitutional rights of "the disabled, partial disabled, pro se litigants, and minorities" [Petitioner's Br., p. 5]. Petitioner clearly has not complied with the requirement of Supreme Court Rule 14 by stating concisely the question presented for review, nor has he identified what the Respondent has done to violate his rights. In those circumstances, it is not possible for Respondent to present coherent rebuttal.

Petitioner complains of how certain "individuals . . . are being treated by the Massachusetts Courts and judges" [Petitioner's Brief, p. 6]. Yet the defendant in this case is a private party. This is, therefore, not the proper forum for raising those issues.

ISSUES II, V and VI

These Issues Raise No Federal Question; The State Court Has Already Applied Res Judicata Against Petitioner On These Issues

As with Issues IV and VII, these Issues raise no "important federal question" appropriate for resolution by this Court, within the meaning of Rule 10(b) and (c) of this Court. They relate to strictly state court matters.

Additionally, this is another abuse of the judicial system by Petitioner utilizing a back-door attempt to have this Court review, again, matters that have already been resolved against Petitioner all the way through this Court. This is no less than Petitioner's third attempted bite at this same apple.

Neither Suslak nor Hanover Insurance Company are parties to this instant matter. Petitioner did, in fact, bring a separate and direct action against Hanover Insurance Company, alleging this very conduct by Hanover (and commencing his unwarranted and scurrilous personal attacks upon Suslak) (Norfolk Superior Court No. 93-00574). That matter was resolved in favor of Hanover on its Motion for Summary Judgment [App. 37-38]. That Judgment was affirmed by the Massachusetts Court of Appeals [App. 39; *and see, Davis v. Hanover Insurance Company*, 40 Mass.App.Ct. 1127 (1996)]. The Supreme Judicial Court of Massachusetts denied a request for Further Appellate Review [App. 40; *and see, Davis v. Hanover Insurance Company*, 423 Mass. 1104 (1996)]; and this Court denied a similar request for Certiorari [App. 41], and Reconsideration [App. 42].

In September of 1997, Petitioner brought another complaint in the Norfolk County Superior Court (No. 97-01716) alleging precisely the same issues [App. 51]. That matter was resolved in Hanover's favor on a Motion to Dismiss [App. 54], on the basis of res judicata [App. 56-63]. That matter is currently before the Massachusetts Appeals Court, and there is every reason to believe that the lower court judgment will be affirmed.

Thus, the facts which Petitioner alleges against Hanover were resolved against Petitioner first in Norfolk Superior No. 93-00574; and again in Norfolk Superior No. 97-01716. These are the same arguments that Petitioner tries to raise again in Issues II, V, and VI of this Petition.

Petitioner has already had his day in court on these issues, and they have been resolved against him on each and every such occasion.

It is also to be noted that Petitioner was admonished in that case not to bring any further complaints against Hanover on these issues [A. 62]. Hanover asks that this Honorable Court enter a similar admonishment to Petitioner that he not be permitted to enter any complaint or request for Certiorari in the Federal Courts against Hanover, Lauria or Suslak based on the same series of facts as alleged in the instant Petition.

ISSUE III

This Issue Has Been Waived Because Petitioner Did Not Raise It At The State Court Level; Petitioner Had Actual Notice

As noted above, neither this Issue, nor Issue I, was ever raised at any level of the state court proceedings.

Petitioner's argument on Issue III fails to identify any "important federal question" or "important question of federal law", within the meaning of Rule 10(b) or (c) of the United States Supreme Court Rules. This Court should not review the judgment of a state court "except where a substantial federal question is involved". *Reich v. City of Freeport*, 388 F.Supp. 953, 955 (N.D.Ill. 1974), *aff'd* 527 F.2d 666 (1976). In the instant matter, Petitioner has failed to identify any such important or substantial federal question.

Petitioner's due process argument here apparently is that he never received notice of the thirty-day nisi order entered in the trial court in October of 1991 [see Petitioner's Brief, p. 7].

Petitioner does not define how federal concepts of due process and equal protection are implicated here.

Further, if the Petitioner is complaining of action or inaction by the court or its officers, they are not defendants in this matter.

If the Petitioner is complaining of action or inaction by the Respondent, it is clear that the Respondent is a private party. Only actions taken under the color of state law are implicated in Fourteenth Amendment cases. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). "[C]onstitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities." *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

As to the substance of Petitioner's argument here, he has acknowledged that he "learned of this entry when he

filed his Motion For Scheduling Trial Date and Plaintiff's Motion to Amend Complaint" [Petitioner's Brief, p. 8]. This occurred at the BMC, and before retransfer to the Superior Court. Yet in neither PLAINTIFF'S MOTION TO REMOVE DISMISSAL JUDGMENT filed at the BMC [App. 9], nor in PLAINTIFF'S MOTION IN OPPOSITION TO VACATE RETRANSFER TO SUPERIOR COURT filed at the Superior Court [App. 18], did Petitioner even raise an issue of notice to him. Nor did he raise that issue before the Appeals Court or the Supreme Judicial Court of Massachusetts.

Petitioner also fails to note for this Court that, at the time when settlement was reported to the court, he was represented by counsel who participated in the report of settlement on behalf of Petitioner and was given notice of all proceedings. Indeed, if Petitioner had raised this issue properly before the trial court, Respondent would have been able to obtain the testimony of the lawyer who represented Petitioner at the time, in order to confirm proper notice at all stages. It is well-settled in Massachusetts law that notice to a party's counsel of record is sufficient. *Siegel, Petitioner*, 309 Mass. 553 (1941); *Holmes v. Fitchburg & Leominster Street Railway*, 347 Mass. 313, 318-319 (1964); Rule 5(b) of the Massachusetts Rules of Civil Procedure.

Also on this precise issue, when the Boston Municipal Court denied Petitioner's Motion to Vacate the Dismissal which had occurred in 1991, the court noted that "[n]otice of this order was sent to the parties on October 9, 1991" [App. 11]. That Order further noted that the case was to be automatically dismissed in thirty days (as of November 12, 1991).

Lastly, it is to be noted that the one case relied upon by Petitioner in support of his position – *Griffin v. Powers*, 1 Mass.App.Ct. 846 (1973) – is precisely the same case that the Superior Court relied upon to allow Respondent's Motion to Vacate the Retransfer [see App. 22]. Thus, there is no support in the law for the Petitioner's position.

ISSUE IV

Mere Errors In State Court Decisions Are Not Reviewable By This Court; Nor Is Alleged Misconduct By An Attorney For A Party

Petitioner is plainly wrong when he states in his heading to Issue IV that "Certiorari should be granted when the inferior courts erred in its decisions" [Petitioner's Brief, p. 7]. The inferior courts in this instance were the state courts of Massachusetts. Rule 10(b) and (c) of this Court make it clear that Certiorari is only available for review of state court cases that have decided "an important federal question" or "an important question of federal law". *See, Reich v. City of Freeport, supra.* Petitioner has identified no such issue in Issue IV of his Petition.

Petitioner's first argument – that he was not notified by the court that his action was reported settled – has been dealt with above. His counsel did have notice, and he never raised this issue at the trial court (where it could easily have been litigated and resolved, unquestionably to Petitioner's dissatisfaction) or in the state appellate courts.

His second argument relates to alleged falsehoods by Suslak. Beyond the fact that these untrue, unwarranted and scurrilous attacks on Suslak are irrelevant to the underlying proceedings, Suslak is wearying of the Petitioner's incessant resort to these personal attacks. Although this is not the appropriate forum to resolve these issues, suffice it to say that none of the assertions made by Suslak in this matter have been untrue or in the slightest bit misleading.

In no event is it an issue that is appropriate for this Court's review on Certiorari.

ISSUE VII

The Attorney Is Not A Party To These Proceedings; This Court Has No Jurisdiction Relating To The Conduct Of Attorneys In State Court Proceedings; Sanctions Should Be Entered Against Petitioner

Suslak is not and never has been a party to these proceedings. Even if he had been, Petitioner has presented no authority for the concept that this Court has jurisdiction to concern itself with matters related entirely to disciplinary rules for attorneys. Respondent is loathe to even respond to these ludicrous assertions by Petitioner lest any such response should lend credence to his fanciful allegations.

It should, at least, be noted, however, that Suslak is wearying of the incessant, unwarranted and scurrilous personal attacks leveled at him by this Petitioner.

Petitioner has already been admonished in the state court to the effect that "[s]hould the plaintiff, Fred Davis,

bring another duplicative complaint against this defendant, Hanover Insurance Company, sanctions should be considered at that time" [App. 62]. Hanover is currently seeking an express affirmance of that admonition from the Massachusetts Appeals Court but that appeal has not as yet been decided.

Recognizing that this Court has established a practice of admonishing petitioners in appropriate circumstances – *Whitaker v. Superior Court of California*, 514 U.S. 208 (1995) – it is respectfully requested that this Court enter an order prohibiting this Petitioner from bringing any further actions or petitions in the federal courts which name Lauria, Hanover Insurance or Suslak as defendants and which spring from the same series of events which underlie this matter.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied in its totality.

Respectfully submitted,

GEORGE R. SUSLAK, ESQ.
Counsel of Record for Respondent
STANTON & LANG
P.O. Box 1080
200 Broadway
Lynnfield, MA 01940
(978) 595-1440

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DOCKET **No. 90-0408**

OCT 9 1991

FRED DAVIS vs. ANTHONY LAURIA

Plaintiffs Defendants

Tort B03
Action
(F)

Ad damnum Jury

SUFFOLK, ss.
SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT FOR
CIVIL BUSINESS

Plaintiffs Counsel
Ronald E. Gluck BBO#195960
Stuart Ravech
125 Summer St., Boston 02110 439-0200
195960
Fred Davis (pro se)
353 Bryant St.
Malden, Ma. 02148

7-8-91
Robert Abrams
50 Union St. #1
Newton, Mass 02159

Defendant's Counsel
Driscoll, Gillespie & Stanton
Mark F. Mahnken BBO#314400
200 Broadway
P.O. Box 850
Lynnfield, Ma. 01940 596-2200

Trustees
1
2
3
4

Trustee's Counsel
1
2
3
4

1990 Date	No.	Entered
Jan. 22	1	Complaint Jury demand on complaint.
Jan. 22	2	Civil Action Cover Sheet re: Complaint.
Jan. 22	3	Ints. of plff. to deft. (1st set).
Apr. 10	4	Jury demand of deft. (All Issues)
Apr. 20	5	Summons returned.
Apr. 27	6	ANSWER.
May 2	7	Ans. of deft. to ints. of plff.
May 17	8	Ints. of deft. to plff.
July 18	9	Ans. of plff. to ints. of deft.
Oct. 15	10	Motion of deft. for an order compelling plff. to produce Federal Income tax returns.
Oct. 15	11	Motion of plff. to be heard by oral argument.
Oct. 15	12	Opposition of plff. to deft's motion to compel production of Federal Income tax returns.
Nov. 8	13	Motion of deft. for an order compelling plff. to produce Federal Income Tax

		returns, and allowed, Plaintiff must produce the documents requested by 11/15/90 to deft's atty. (Cratsley, J.) notice sent 11/9/90.
Nov. 13	14	Motion of deft. to extend discovery deadline 90 days and assented to. (Cratsley, J.).
Nov. 16	14A	Mo. of Atty. Stuart Ravech to withdraw. Denied. (See Motion)/
Nov. 26	15	App. of deft. for an order to inspect Malden Hospital records of plff.
Nov. 26	16	Order on app. of deft. to inspect Malden Hospital records of plff. (Rouse, J.). No. sent 2/12/91.
*Nov. 19	14B	ORDER: Action ordered remanded to B.M.C., (Cratsley, J.)/
*Dec. 17	–	Motion (P#14) Allowed. (Cratsley, J.). Notice Sent 12-18-90.
*Dec. 11	17	Motion of plff. for reconsideration for plff. to produce tax returns to deft. Filed in open court & argued by Mr. davis & defts. attorney. (Cratsley, J.).
Dec. 18	–	Mo. (P#17) Denied. plff. must produce his fed. tax returns as requested within 30 days. (Cratsley, J.). notice sent. 12-19-90.
Dec. 21	18	Motion of deft. for order granting access to criminal Offenders record information concerning the plff.
Dec. 27	19	Plff's Notice of Appeal.

Dec. 28	20	Motion of plff. to stay the Order entered December 18, 1990. Denied. (Cratsley, J.). Notice sent 1/3/91.
Jan. 7	–	Mo. (P#18) Denied. (Cratsley, J.), No. sent 1/9/91.
Jan. 7	21	Plff's. Notice of Appeal.
Jan. 10	22	Plff's notice of appeal.
Jan. 16	–	Notice to Justice John C. Cratsley of the filing of a Notice of Appeal.
Jan. 16	–	Notice of Service of Notice of Appeal to: Mark F. Mahnken, Esquire of Messrs. Driscoll, Gillespie & Stanton.
Feb. 4	23	Opp. of deft. to plff's notice of appeal.
Feb. 6	24	Plff.'s notice of appeal.
Feb. 12	–	ACTION TRANSFERRED ACCORDINGLY (SEE P#14B

I HEREBY ATTEST AND CERTIFY ON FEBRUARY 12, 1991 THAT THE FOREGOING DOCUMENT IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: James J. O'Reilly
ASST. CLERK

FEB 13 1991

3-25-91 Defts motion to compel further answer to Expert Mts. follow

3-25-91 Defts motion to compel supplementation of plffs response to production of documents follow

4-8-91 *Plffs atty's motion to withdraw filed*

4-26-91 *Both parties appearing Plff appearing Atty for Plff. motion for leave to withdraw is heard and allowed! The Court sets down Defts motion to compel Plff. to further answer Mts #12 and Defts motion to compel Plff to supplement production of documents to be heard on May 24, 1991 Gino J.*

5-7-91 *Deft Anthony Lauria's motion under Rule 37, B, 2, B filed.*

10-9-91 Reported Settled, "30 day NiSi order" for the entry of Dismissal Judgment Entered. *Whitman*

3-2-92 *Atty. Stuart Ravch notice of Lien filed.*

5/16/97
A TRUE COPY ATTEST

/s/ Stuart F. Durant
ASSISTANT CLERK

6/16/97 *plf (pro-se) and atty Flanagan for def appearing plf motion to vacate dismissal is heard & reserved (Bernstein J)*

6-23-97 *after reservation, plff's motion to vacate dismissal is denied. Bernstein J.**

PLAINTIFF
6-27-97 BEING AGGRIEVED BY THE FINDING OR DECISION OF THE COURT REQUESTS THAT THE ACTION BE TRANSFERRED FOR DETERMINATION BY THE SUPERIOR COURT. DOCKET AND PAPERS TRANSMITTED TO SUPERIOR COURT THIS DAY, *6-30-97*

---

*Italic is handwritten.

COMMONWEALTH OF MASSACHUSETTS
BOSTON MUNICIPAL COURT

SUFFOLK, ss

CIVIL BUSINESS
No. T-41026

FRED DAVIS, PLAINTIFF

vs.

ANTHONY LAURIA,
DEFENDANT

PLAINTIFF'S MOTION FOR SCHEDULING TRIAL DATE

Now comes the plaintiff, Fred Davis, in the above-cited action and requests the Court to schedule a trial by jury as soon as possible.

By,
/s/ Fred Davis
Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

HEARING NOTICE

The hearing on the foregoing motion will be heard May 16, 1997, 9:00 A.M. at the Old Courthouse Room 394 Boston, Massachusetts.

CERTIFICATE OF SERVICE

I, certify that I mailed a true copy of Plaintiff's Motion For Scheduling Trial Date and Hearing Notice to: Frank

Pietrasik, Hanover Insurance Company 35 Braintree Hill Office Park Suite 301 P.O. Box 9159, Braintree, MA 02184 Certified Mail: P 576 480 152.

Date 4-24-97 /s/ Fred Davis

COMMONWEALTH OF MASSACHUSETTS
BOSTON MUNICIPAL COURT

SUFFOLK, ss

CIVIL BUSINESS
No. T-41026

MOTION LIST MARKING

Place above action on the Motion-Assignment Motion list for 6th day of June at 9:00A.M. at the Old Courthouse Room 394 Boston, Massachusetts for hearing on the following motion:

PLAINTIFF'S MOTION TO REMOVE DISMISSAL JUDGMENT

Such motion has been filed and notice given as required by rule of Court.

/s/ Fred Davis Plaintiff

COMMONWEALTH OF MASSACHUSETTS
BOSTON MUNICIPAL COURT

SUFFOLK, ss

CIVIL BUSINESS
No. T-41026

FRED DAVIS, PLAINTIFF

vs.

ANTHONY LAURIA,
DEFENDANT

PLAINTIFF'S MOTION TO REMOVE DISMISSAL JUDGMENT

Now comes the plaintiff, Fred Davis, in the above-cited action and requests the Court to remove dismissal judgment as this action was not settled.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REMOVE DISMISSAL JUDGMENT

May 7, 1997, the plaintiff filed with the Court Plaintiff's Motion For Scheduling Trial Date and Plaintiff's Motion To Amend Complaint.

These motions were to be placed on the Motion List to be heard on May 16, 1997.

However, when the plaintiff appeared in Court on May 16, 1997, his motions were not on the Motion List.

The plaintiff inquired in the Clerk's Office as to why his motions were not on the Motion List.

Plaintiff was informed that the case was settled.

This case has not been settled.

Therefore, the plaintiff requests the Court to remove the dismissal Judgment, in order that the plaintiff can move this action for trial.

Based on the foregoing the plaintiff requests the Court to allow his motion.

By,
/s/ Fred Davis
Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

HEARING NOTICE

The hearing on the foregoing motion will be heard June 6, 1997, at 9:00 A. M. at the Old Courthouse Room 394 Boston, Massachusetts.

CERTIFICATE OF SERVICE

I, certify that I mailed a true copy of Plaintiff's Motion To Remove Dismissal Judgment to: Frank Pietrasik, Hanover Insurance Company 35 Braintree Hill Office Park Suite 301 P.O. Box 9159. Braintree, Ma 02184 Certified Mail No. P 576 480 058.

DATE 5-7-97 /s/ Fred Davis

Commonwealth of Massachusetts

Suffolk, ss. Boston Municipal Court
No. T-41026

****

Fred Davis *

v. * Order

Anthony Lauria *

****

Plaintiff seeks to vacate a dismissal which entered in the Boston Municipal Court on November 12, 1991. A hearing on the motion was held on June 6, 1996.

The matter was previously scheduled for trial on October 9, 1991 and was reported settled on that date. Having been reported settled, an order entered on October 9, 1991 that the case was to be dismissed as to all claims on November 12, 1991, unless the parties filed an agreement for judgment before that date. Notice of this order was sent to the parties on October 9, 1991. No agreement for judgment was filed and the case was subsequently dismissed.

Nearly six years has passed since the dismissal entered. The plaintiff provides no excusable reason by way of affidavit for the delay in bringing this matter forward.

Accordingly, the motion is denied.

/s/ Patricia Bernstein

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. BOSTON MUNICIPAL COURT
NO. T-41026

****

FRED DAVIS, *
PLAINTIFF *
*
VS. *
*
ANTHONY LAURIA, *
DEFENDANT *

****

REQUEST FOR RETRANSFER BACK TO THE SUPERIOR COURT

Now comes the plaintiff Fred Davis in the above-cited action and aggrieved by the attached Court's Order request that this action be retransferred back to the Superior Court.

By,
/s/ Fred Davis
Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

CERTIFICATE OF SERVICE

I certify that I mailed a true copy of the foregoing to: Christopher P. Flanagan Stanton & Lang 200 Broadway Suite 102 Lynnfield, Ma 0-1940 postage prepaid.

DATE 6-27-97 /s/ Fred Davis

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO: SUCV90-00408C

FRED DAVIS,)
Plaintiff)
)
VS.)
)
ANTHONY LAURIA,)
Defendants)

DEFENDANT'S MOTION TO VACATE RETRANSFER TO SUPERIOR COURT

Now comes the defendant, Anthony Lauria, and hereby requests this court to vacate the July 7, 1997 retransfer of the above-captioned matter as the plaintiff's request for retransfer was untimely and the Boston Municipal Court lacked the power to retransfer this matter beyond the statutory time period.

FACTS

This is an action arising out of a motor vehicle accident which allegedly occurred on February 11, 1987. The plaintiff, Fred Davis ("Davis") filed a complaint against the defendant, Anthony Lauria ("Lauria") in Suffolk County Superior Court on or about January 18, 1990 (Exhibit A). This action was subsequently remanded to the Boston Municipal Court on February 12, 1991. (Exhibit B). The Boston Municipal court scheduled the case for trial on October 9, 1991. The case was reported settled to the Boston Municipal Court on October 9, 1991. (Exhibit C). An order entered on October 9, 1991 that the

case would be dismissed as to all claims on November 12, 1991, unless the parties filed an agreement for judgment. (Exhibit C) Notice of this order was sent to the parties on October 9, 1991. (Exhibit C). No agreement for judgment was filed, therefore, the case was dismissed as of November 12, 1991.

On or about May 19, 1997, nearly six years after the dismissal, Davis filed a Motion To Remove Dismissal Judgment (Exhibit D). On June 23, 1997, the Boston Municipal Court denied Davis' motion, noting that the case had been dismissed in November of 1991 and the plaintiff had provided "no excusable reason" for the delay in filing his motion.

On or about June 27, 1997, Davis filed his Request For Retransfer Back To The Superior Court. (Exhibit E). On or about July 7, 1997, this Court docketed the reactivation of this matter. (Exhibit F).

LAW

MGL ch. 231 s 102C governs the retransfer of cases to the Superior Court after a finding or a decision of the District Court. A request for a retransfer "shall be filed with the clerk of the district court within ten days after notice of the finding or decision." MGL ch. 231 s. 102C. If Davis desired to seek a retransfer of the case to the Superior Court, then he had ten days from notice of the decision or finding of the Court which dismissed this action. The papers of the Boston Municipal Court clearly indicate that the Court's decision to dismiss the plaintiff's claim was made on October 9, 1991. The papers also show that the plaintiff had notice of this order. According to

MGL ch. 233 s. 102C, Davis had until October 19, 1991 within which to file his request. No such request for retransfer was filed.

Arguably, the plaintiff could contend that the ten day time period did not commence until November 12, 1991, by which date the parties could have filed an agreement for judgment. Assuming *arguendo*, that the Court adopts this position, then the plaintiff would have had until November 22, 1991 to file his request. Again, no such request was filed.

On June 27, 1997, almost six years after the Court's order of dismissal, Davis finally filed his request for retransfer. Obviously, Davis is attempting to revive the time within which to file a request for retransfer by filing a groundless motion to remove the earlier dismissal simply to obtain a Court order, from which he could then attempt to retransfer this claim.

The decision which terminated the case of *Davis v. Lauria* was issued on October 9, 1991. The plaintiff can not be allowed to create a new window of opportunity to retransfer the case merely by filing a motion to remove the dismissal, years beyond the statutory deadline for such requests.

Given the fact that the plaintiff's 1997 request for retransfer was untimely, the Boston Municipal Court had no authority to order a retransfer and the judgment of dismissal should not be disturbed. *Griffin v. Powers*, 1 Mass. App. 846, 301 N.E.2d 691 (1973).

In *Powers*, after a trial, the Court entered a finding for the plaintiff on June 11, 1970. Judgment for the plaintiff

entered on June 26, 1970. The defendant apparently never received notice of the entry of judgment, therefore, he did not timely file a request for retransfer to the Superior Court within the ten day time period. Upon the defendant's motion, the Court allowed the defendant's request to vacate the June 26, 1970 judgment as long as the defendant posted a bond by December 4, 1970. The defendant timely filed the required bond, therefore, effective December 4, 1970, a new judgment for the plaintiff entered. The defendant had ten days from December 4, 1970 to file his request for retransfer, which he did not file.

On January 27, 1972, the defendant filed his request for a retransfer, which request was allowed. The plaintiff thereafter moved to vacate the retransfer on the grounds that it was not timely filed. The Appeals Court agreed, holding that the District Court "had no authority, after the ten days had elapsed, to order retransfer." *Id.*

More recently, it has been confirmed that a District Court has no authority to permit retransfer after the expiration of the ten day time period. *Barrett v. Lynn Ladder & Scaffolding Co., Ind.*, 1994 Mass. App. Div. 217.

As is the case with the claim before the Court today, Davis failed to file his request for transfer in a timely fashion. Therefore, the District Court had no authority to order the retransfer. To allow a party to escape the ten day requirement by simply filing a motion five, ten or, perhaps, twenty years later would defeat the purpose of MGL ch. 233 s. 102C and litigation could never be considered final and completed.

SUMMARY

Based upon the above, the defendant respectfully requests that this Court vacate the Boston Municipal Court's retransfer order to this Court.

By defendant's attorney,

George R. Suslak, Esquire
STANTON & LANG
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940-2314
(617) 595-1440
BBO#: 541921

Dated: _____

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK
THE SUPERIOR COURT

DOCKET # SUCV90-00408C

FRED DAVIS, Plaintiff

vs.

ANTHONY LAURIA,

Defendant

PLAINTIFF'S MOTION IN OPPOSITION TO VACATE RETRANSFER TO SUPERIOR COURT

Now comes the plaintiff, Fred Davis, in the above-cited action and opposes the defendant's Motion to Vacate Retransfer to Superior Court as the defendant's motion was done in bad faith, Defendant's Motion does not comply with Massachusetts Rules of Civil Procedure and Mr. Suslak violated his Attorney's Oath Massachusetts General Law 221 section 38 by committing falsehood to the Court. There are violations of deceptive practices, Crimes against the disabled and Massachusetts General Laws Chapter 19A § 14 "Financial Exploitation".

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN OPPOSITION TO VACATE RETRANSFER TO SUPERIOR COURT

Pursuant to Massachusetts Rules of Civil Procedure prior to filing a Motion the moving party must confer with the party before filing a motion, however, this was

not the case Mr. Suslak merely sent the motion to the plaintiff without conferring with him, which is a violation of the Massachusetts Rules of Civil Procedure and must be stricken.

The defendant is acting in bad faith and his attorney is violating his Attorney's Oath which states in pertinent part:

ATTORNEY'S OATH

"YOU _____ SOLEMNLY SWEAR THAT YOU WILL DO NO FALSEHOOD, NOR CONSENT TO THE DOING OF ANY IN COURT."

June 6, 1997, the plaintiff appeared in the Boston Municpal [sic] Court on Plaintiff's Motion To Remove Dismissal Judgment, the Court denied the plaintiff's motion and the plaintiff filed a timely Motion to Retransfer to the Superior Court and Plaintiff was notified of that transfer on July 7, 1997.

Therefore, when Mr. Suslak informs the Court that plaintiff's transfer is not timely he is committing a falsehood to the Court.

There is no evidence in the Court's record that the case was settled by plaintiff's attorney Robert Abrams nor by the plaintiff Fred Davis.

The mere fact that there is an entry on the docket sheet has no bearing on the case, since there is no evidence to substantiate the action was settled.

The defendant and his attorney are using deceptive business practices and crimes against the disabled to cheat the plaintiff out of monies.

In addition plaintiff is an elderly person and the defendant and his attorney is using "Financial Exploitation" to cheat the plaintiff from monies which is a violation of Massachusetts General Laws Chapter 19A § 14.

The bottom line is that the defendant and his attorney are continuing to harass and hurt the plaintiff as the plaintiff is disabled because of the defendant.

Mr. Suslak in his motion page 1 as (Exhibit A). however, there is no Exhibit A affixed to his motion Page 1 (Exhibit B) page 1 (Exhibit C) page 2 (Exhibit D) page 2 (Exhibit E) page 2 (F) as previous stated none of these Exhibits were furnished to the plaintiff. There is no Certificate of Service.

Therefore, the facts clearly reveal that Mr. Suslak is not being honest and is hiding the true facts of the case.

Wherefore, the plaintiff moves the Court to deny the defendant's motion and schedule this action before a jury as soon as possible.

By,

Fred Davis, Plaintiff
353 Bryant Street
Malden, Ma 02148

CERTIFICATE OF SERVICE

I certify that I mailed a true copy of Plaintiff's Motion In Opposition to Vacate Retransfer To Superior Court and Memorandum in Support to Plaintiff's Motion In Opposition to Vacate Retransfer to Superior Court to: George Suslak Stanton & Lang P.O. Box 1080 Lynnfield Woods

Office Park 200 Broadway US Route 1 South Lynnfield, Ma 01940-2314 certified Mail No. P 576 480 131 postage prepaid.

7-23-97

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Notice sent 8-26-97

FD-PRO-SE
MFM
CPF
STE
LA

SUPERIOR COURT
CIVIL ACTION
No. SUCV90-00408-C

FRED DAVIS,

Plaintiff

v.

ANTHONY LAURIA,

Defendant

COURT ORDER ON DEFENDANT'S MOTION TO VACATE RETRANSFER TO SUPERIOR COURT

After consideration of defendant's motion and plaintiff's opposition, the defendant's Motion to Vacate Retransfer to Superior Court is **ALLOWED**. In this court's view, the Boston Municipal court had no authority after they denied plaintiff's motion to remove the 1991 dismissal of this case to then order it retransferred to the Superior Court. The plaintiff's right to obtain that retransfer ended on November 22, 1991, i.e. ten days after the case was dismissed in the Boston Municipal Court on November 12, 1991.

The decisions of the Appellate Courts make it clear that plaintiff cannot revive this old case by seeking retransfer many years after it's life ended, and the right

to claim retransfer ran out, in the Boston Municipal Court. See *Griffin v. Powers*, 1 Mass. App. 846, 301 N.E. 2d 691 (1973) and *Barrett v. Lynn Ladder and Scaffolding Co.*, 1994 Mass. App. Div. 217.

/s/ John C. Cratsley
John C. Cratsley
Justice of the Superior Court

DATED: August 22, 1997

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

97-P-2327

FRED DAVIS

vs.

ANTHONY LAURIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The pro se plaintiff appeals from a Superior Court order allowing the defendant's motion to vacate an order retransferring this matter from the Boston Municipal Court. In essence, the plaintiff seeks to revive the underlying motor vehicle tort action which was reported settled in 1991. For the reason, if no other, that principles of res judicata preclude the plaintiff from asserting that there was no settlement of this action by our decision in *Davis v. Hanover Ins. Co.*, 40 Mass. App. Ct. 1127 (1996), cert. denied, 117 S. Ct. 685 (1997),[1] and thus that retransfer to the Superior Court would be futile, we affirm.

Order allowing motion to vacate retransfer affirmed.

---

[1] In the earlier case, we affirmed a summary judgment for the insurer on Davis's complaint alleging breach of the settlement agreement. The agreement is evidenced by a written release dated September 20, 1991, which Davis executed, purporting to release the present defendant and the insurer of all claims by Davis arising out of the motor vehicle accident giving rise to the instant action.

By the Court (Greenberg,
Gillerman & Rapoza, JJ.),

/s/ Cris G. Micchia
Asst. Clerk

Entered: February 10, 1999

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS

SJC NO. _____
AC NO. 97-P-2327

FRED DAVIS, Appellant vs. ANTHONY LAURIA HANOVER INSURANCE COMPANY, Appellees	**APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW**

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

For reasons set forth in this application, Fred Davis, Appellant requests that the full Supreme Judicial Court review the February 10, 1999, decision of the Appeals Court in this matter.

II. STATEMENT OF PRIOR PROCEEDINGS

The plaintiff-appellant, Fred Davis is a senior citizen residing at 353 Bryant Street Malden, Massachusetts.

Anthony Lauria, Hanover Insurance Company's insured, negligently operated a motor vehicle causing a motor vehicle accident, in which Hanover Insurance Company admits liability.

The appellant received severe bodily injuries resulting in partial permanent disability because of this accident.

The appellant has been unable to work, due to the accident, and has lost approximately $46,000.00, in wages, which resulted in the loss of his employment.

In addition, there was excessive damage to the appellant's motor vehicle and large medical bills.

Appellant is unable to work and needs constant care.

The appellees committed crimes against the disabled and violated Massachusetts General Laws Chapter 19A § 14, using "Financial Exploiation [sic]" to cheat the appellant from monies due him.

Appellees have used means of fraud and lied to the Appeals Court as their defense.

May 7, 1997, appellant filed his Motion For Scheduling Trial Date (app. p. 5) and Plaintiff's Motion To Amend Complaint (app. p. 6). these motions were to be placed on the motion list to be heard on May 16, 1997, the appellees did not oppose these motions (app. p. 4).

The appellant appeared in court on May 16, 1997, however, his motions were not on the motion list.

The appellees did not appear in court for the scheduled hearing of these two motions.

The appellant inquired in the Clerk's Office as to why his motions were not on the motion list.

Appellant was informed that the case was settled, however, that was not the truth.

The case was never settled and the docket sheet clearly shows that fact, no notices were sent, nor is there a name of an individual who reported it settled (app. p. 2), moreover, there is no document in the case file to substantiate, the fact that the case was settled.

Appellant filed Motion To Remove Dismissal Judgment (app. p. 10). There was no opposition from the appellees (app. p. 9). The district court denied this motion.

Appellant filed Request For Retransfer Back to the Superior Court (app. p. 14).

Appellees filed Motion To Vacate Retransfer to the Superior Court. Appellant filed his Motion in Opposition To Vacate Retransfer to the Superior Court (app. p. 15).

Appellant filed Plaintiff's Motion For Sanctions Against George R. Suslak For Telling Falsehoods to the Court (app. p. 19). Appellees opposition was not timely, therefore was returned to the appellees.

The Superior Court allowed the defendants' Motion To Vacate Retransfer To the Superior Court (app. p. 22).

Appellant filed his Notice of Appeal.

The Appeals Court erred in its decision since it was based solely on falsehoods it obtained from the appellees along with statements of fraud.

Now the case is before this Honorable Court for Application For Further Appellate Review.

III. FACTS

The appellees admit liability in this action.

The action was not settled and appellant, Davis has not received one penny in this action.

Appellant was not notified that the action was settled by the court **SEE ATTACHED DOCKET ENTRY SHEET.**

Appellant was a victim of violation of M.G.L 19A Abuse of Elderly persons: "Financial Exploitation".

The Appeals court erred in its decision, since their decision was based solely on fraud, falsehoods and obstruction of justice, which the appellees, their attorney George R. Suslak furnished them.

Attorney George R. Suslak violated the Massachusetts Canon Rules, and Attorney's Oath.

IV. ISSUES PRESENTED TO SUPREME JUDICIAL COURT

Appellant is requesting review of the Appeals Court's decision of February 10, 1999, based on Appellant's assertion the Appeal Court should have reversed the decision of the Suffolk Superior Court.

The decision of the Appeals Court was based on errors of law, unsupported evidence, fraud, falsehoods, obstruction of justice and failure to address all issues that were presented for review.

V. ARGUMENT

A. APPEALS COURT ERRED IN LAW WHEN IT STATED THAT CASE WAS SETTLED

The case was not settled. The fact is clearly substantiated by evidence that there is no document in the court file that states the case was settled. There were no notices that were sent to the appellant, nor to any other party in this action **SEE ATTACHED DOCKET SHEET.**

In addition, there is no name of the individual who reported that the case was settled.

SEE GRIFFIN v. POWERS 301 N.E. 2d 691 the court allowed petition to vacate judgment because of the failure to receive notice of the original finding. Therefore, the appellant's Motion to Vacate Judgment should have been allowed, because if there was a finding he should have been notified.

Therefore, since the District Court denied appellant's motion it was appropriate for the District Court to transfer back the action to the Superior Court.

B. THE ACTS AND PRACTICES OF THE APPELLEE, HANOVER INSURANCE COMPANY WERE UNFAIR DECEPTIVE WITHIN THE MEANING OF M.G.L. CHAPTER 93A

Massachusetts General Law c. 176D § 3 § (9) f inserted by St. 1972, c 543 § 1, provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear". Massachusetts General Law c. 93A, § 2 (a) (inserted by St. 1967

C. 813 § (1), covers such insurance practices in its prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce". **SEE DODD v. COMMERCIAL UNION INSURANCE COMPANY** 353 Mass at 78 "provides for recovery of up to three but not less than two times actual damages. . . . "

Hanover Insurance Company admits to liability, however, they are using means of fraud to inform the court that the case has been settled.

Hanover Insurance Company shows no evidence of a cancelled check that the case was settled, no cancelled check that medical bills were paid, no cancelled check that damage to the appellant's motor vehicle was paid.

The bottom line is the case was not settled.

C. THE APPEALS COURT ERRED IN STATING THERE WAS AN AGREEMENT EXECUTED

"BLACK'S LAW'S DICTIONARY "execute: "to do, to follow out according to the terms to fulfill the purpose".

The Appeals Court erred as an agreement was not executed, here again, the Appeals Court took the word of the appellees and their attorney George R. Suslak.

The appellees and their attorney George R. Suslak have lied to the Court the case was never settled because appellant was not paid.

Hanover Insurance Company have no evidence to show that agreement was executed, they have no evidence of a cancelled check, no evidence that medical bills

were paid, no evidence that damage to the appellant's motor vehicle was paid.

There is no evidence whatsoever, that appellant received one penny from the appellees.

D. THE COURT ERRED IN NOT PLACING PUNISHMENT AGAINST THE APPELLEES FOR VIOLATION OF MASSACHUSETTS GENERAL LAWS CHAPTER 19A § 14 "FINANCIAL EXPLOITATION" AGAINST AN ELDERLY PERSON

Massachusetts General Laws Chapter 19A "Financial Explitation": "an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, which gain would otherwise benefit the elderly person".

Appellant is an elderly person and is a victim of Financial Exploitation by the appellees they have caused the appellant a gross monetary and property loss which gain would have benefit the appellant.

Their acts have caused the appellant a gross amount of medical bills leaving him with a permanent partial disability and is now unable to care for himself needing constant care.

The Appellees have caused the appellant lost wages in the amount of approximately $46,000.00, leaving him unable to work.

The appellees have used a cover-up to hide these acts by telling falsehoods to the court that the case has been settled.

E. THE APPEALS COURT ERRED IN NOT PLACING SANCTIONS AGAINST GEORGE R. SUSLAK FOR TELLING FALSEHOODS TO THE COURT

Canon Rules 1 – Disciplinary Rules

DRI – 102 MISCONDUCT

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

GENERAL LAWS 221 section 38 ATTORNEY'S OATH

"You (name) solemnly swear that you will do no falsehood, nor consent to the doing of any in court" So help you GOD.

August 14, 1997, George R. Suslak engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation of the facts.

George R. Suslak made the following statement to the Court: "In support thereof, the defendants state that this action was settled years ago. . . . " This statement is false and Mr. Suslak was fully aware that this action has not been settled.

George R. Suslak has not shown any creditable evidence that the case was settled. He has not shown any

cancelled check that appellant was paid for his injuries, he has not shown any cancelled check that appellant's medical bills were paid, he has not shown any cancelled check that appellant's motor vehicle damages were paid.

The facts clearly reveal that Mr. Suslak has engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation. He has engaged in conduct that is prejudical [sic] to the administration of justice, which is in violation of the Canon Rules.

George R. Suslak has engaged in telling falsehoods to the court, which is in violation also of the Attorney's Oath.

Based on the facts and evidence the Appeals Court erred in not placing sanctions against George R. Suslak.

F. PUBLIC INTEREST IS INVOLVED

The public interest is in complete jeopardy, if the courts are going to accept the word of individuals, who are not telling the truth, without showing evidence that individuals were paid.

CONCLUSION

Appellant, Fred Davis, requests this Honorable Court to remand the action to the Suffolk Superior Court for trial before a jury, legal fees, costs and any other relief the Honorable Court deems appropriate.

RESPECTFULLY SUBMITTED,

/s/ Fred Davis

Fred Davis, Appellant
P.O. Box 721
Everett, Ma 02149

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Christopher P. Flanagan, Esquire
Stanton & Lang
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940

RE: Docket No. FAR-10421

FRED DAVIS

vs.

ANTHONY LAURIA

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: March 26, 1999

To: Fred Davis
Christopher P. Flanagan, Esquire

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO: 93-00574

FRED DAVIS,)
Plaintiff)
vs.)
HANOVER INSURANCE COMPANY,)
Defendant)

MOTION OF DEFENDANT, HANOVER INSURANCE COMPANY FOR SUMMARY JUDGMENT UNDER M.R.C.P. 56

(Filed Sep. 24, 1993)

Now comes the defendant, Hanover Insurance Company and [ ] moves this Honorable Court pursuant to Mass. R. Civ. P. Rule 56 (b) to enter summary judgment in favor of the Counts I-IV of plaintiff's Complaint as a matter of law.

An Affidavit, Memorandum of Law and exhibits are attached hereto.

Defendant
By its attorney,

/s/ Mark F. Mahnken
Mark F. Mahnken
DRISCOLL, GILLESPIE
& STANTON
200 Broadway
P.O. Box 850
Lynnfield, Mass. 01940
(617) 596-2200
BBO: #314-400

Dated: 8/25/93

1/14/94 – After hearing and upon considering all submissions, and the entire file, motion of Defendant, Hanover Insurance Company for Summary Judgment is ALLOWED in its totality. See: Defendant's memorandum affixed hereto

/s/ Thomas E. Connolly,
*JSC**

*Italic was handwritten.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-P-1818

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The judgment is affirmed substantially for the reasons set forth in the brief of the defendant.

So ordered.

By the Court (Dreben, Gillerman & Laurence, JJ.),

/s/ Nancy Turck Foley
Clerk

Entered: June 14, 1996.

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse,
Boston, Massachusetts 02108
(617)-557-1020

George R. Suslak, Esquire
Driscoll, Gillespie & Stanton
200 Broadway
PO Box 850
Lynnfield, MA 01940

RE: Docket No. FAR-08597

FRED DAVIS

VS.

HANOVER INSURANCE COMPANY

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on July 24, 1996, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: July 24, 1996

To: Fred Davis
George R. Suslak, Esquire

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 6, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company
No. 96-640

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 18, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company
No. 96-640

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRED DAVIS, Plaintiff,	)	
v.	)	C.A. No. 95-cv-11837-MLW
HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, Chairman of the Board of Hanover Insurance, Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. May 17, 1996

On August 16, 1995, plaintiff Fred Davis filed this action seeking injunctive and monetary relief stemming from alleged violations of his state and federal constitutional rights. On September 5, 1996, the defendants filed a motion to dismiss the complaint. For the reasons stated herein, this motion must be ALLOWED.

I. The Complaint

According to his complaint, Mr. Davis brought claims of breach of contract and unfair trade practices against the defendants in Massachusetts Superior Court in 1993. The defendants moved for summary judgment on all counts of the plaintiff's state court complaint. This motion was subsequently allowed.

On January 21, 1994, plaintiff filed a notice of appeal with the Superior Court. Since that time, plaintiff has

filed five additional notices of appeal. According to the complaint, the Superior Court "has knowingly and willfully refused to assemble the record and forward it to the Massachusetts Court of Appeals." Plaintiff asserts further that "both Judge Thomas Connolly and the defendant's attorney will not allow the record to be assembled and go to the Appeals Court because they don't want this case to go to the Massachusetts Appeals Court." As a result of these purported activities, plaintiff claims "[v]iolations of State and Federal Constitutional Rights: Equal protection of the law. Obstruction of justice."

II. Analysis

Plaintiff has not stated a viable claim against the defendants in this case. First, the complaint does not identify any actions taken by the defendants which could have caused the plaintiff harm, constitutional or otherwise. The complaint speaks only of actions taken by the Superior Court and the defendants' lawyer.

Second, even if the complaint can be read to implicate the defendants, the constitutional claims cannot survive. It is well-established that the Fourteenth Amendment and the federal civil rights statute, 42 U.S.C. § 1983, are implicated only by action taken under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Lugar v. Edmondson Oil Co.*, 457 U.S 922 (1982). Defendants in this case are private actors. *See Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("[w]ith a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of

private entities.") It is conceivable that plaintiff could argue that the alleged actions of the defendants' attorney in "not allow[ing] the record to be assembled" are sufficiently intertwined with state processes so as to constitute the requisite state action. *See, e.g., Edmondson*, 500 U.S. at 618-28. Even so, this one-sentence allegation against the defendants' attorney is too vague and conclusory to allow this action to proceed under such a theory.

To the extent that plaintiff brings this action under the Massachusetts Civil Rights Act, M.G.L. ch. 12 § 11I, this claim must also be dismissed with prejudice. Although the Massachusetts Civil Rights Act covers purely private action, it requires some form of "threats, intimidation, or coercion." *See* M.G.L. ch. 12 § 11H. No "threats, intimidation, or coercion" by any of the defendants have been alleged in this case.

Finally, as an alternative ground for dismissing this action, it is clear that the plaintiff has suffered no constitutional injury by any failure of the Superior Court to assemble his record for appeal. Mr. Davis currently has no right to appeal the judgment against him in state court. Under M.G.L. c. 231 § 113, a party can appeal only a "final judgment of the superior court. . . . " In the Superior Court action, the defendants filed a counterclaim against Davis, seeking various forms of injunctive and declaratory relief. This counterclaim was not acted upon by the superior court judge at the time he granted summary judgment for the defendants on the plaintiff's complaint. As a result, the judge's decision on the summary judgment motion was not a "final judgment" under § 113. *See Litton Business Telephone systems, Inc. v. Scwartz,*

9 Mass.App.Ct. 847 (1980) (dismissing appeal "because the judgment entered . . . does not dispose of the counterclaim of the individual defendants"); *E.W. Foster Co. v. McLaughlin*, 7 Mass.App.Ct. 865 (1979) ("when there is an adjudication of the claims of fewer than all the parties, no judgment has yet been entered from which an appeal can be taken.") Accordingly, in the absence of a motion for entry of a final judgment under Mass.R.Civ.P. 54(b) or a petition for interlocutory relief under M.G.L. ch. 231 § 118, plaintiff must await resolution of the defendants' counterclaim before appealing the judgment against him.

Accordingly, for the foregoing reasons, the defendants' motion to dismiss is hereby ALLOWED.

/s/ Mark F. Wolf
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1650

FRED DAVIS,
Plaintiff, Appellant,

v.

HANOVER INSURANCE COMPANY, JOHN F. O'BRIEN, CHAIRMAN OF THE BOARD OF HANOVER INSURANCE COMPANY,
Defendants, Appellees.

JUDGMENT

Entered: October 11, 1996

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed.**

By The Court:

Clerk

[cc: Messrs. Davis & Suslak]

Per Curiam. As the record indicates, at the time the instant case was filed in federal district court no judgment had yet entered in state court on the counterclaim of defendants/appellees. Since all claims had not been adjudicated, plaintiff/appellant had no right at that time to appeal the judgment dismissing his action. *See Litton*

Business Telephone Systems, Inc. v. Schwartz, 9 Mass. App. Ct. 865, 865, 400 N.E.2d 281, 281 (1979) (dismissing appeal "because the judgment entered . . . does not dispose of the counterclaim"). Consequently, he suffered no injury from the alleged failure of the state court to assemble his record for appeal.

Affirmed.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 3, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company, et al.
No. 96-1074

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 14, 1997

Mr. George R. Suslak
Stanton & Lang
P.O. Box 1080
Lynnfield, MA 01940

Re: Fred Davis
v. Hanover Insurance Company, et al.
No. 96-1074

Dear Mr. Suslak:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

DEDHAM SUPERIOR COURT
CIVIL BUSINESS
CIVIL ACTION NO.
97 01716

Fred Davis, Plaintiff

vs.

Hanover Insurance Company,
Defendant

COMPLAINT

Parties

Plaintiff, Fred Davis P.O. Box 721 Everett, Ma 02149, County of Middlesex.

Defendant, Hanover Insurance Company conducting business at 35 Braintree Hill Park Braintree, Ma 02184, County of Norfolk.

Facts

The defendant, Hanover Insurance Company engaged in acts of unfair and deceptive business practices.

The defendant, Hanover Insurance Company engaged in acts of Financial Exploitation of a senior citizen.

The defendant, Hanover Insurance Company engaged in acts against the disabled.

Cause of Action

The plaintiff, Fred Davis, is a senior citizen and partially disabled.

The defendant, Hanover Insurance Company by means of fraud, unfair, and deceptive business practices swindled monies from the plaintiff.

The plaintiff issued a 30 day letter to the defendant pursuant to Massachusetts General Laws c. 93A. There was no response from the defendant.

As a direct and proximate result of the fraud, unfair and deceptive acts by the defendant Hanover Insurance Company, plaintiff suffered substantial losses of money and pain and suffering, physical and emotional distress.

Defendant engaged in acts of Financial Exploitation which caused a substantial monetary loss to the elderly plaintiff which gain would have benefited the elderly plaintiff thereby violating Massachusetts General Laws 19A section 14.

The defendants acts also violated the Crimes Against the Disabled, by knowingly and wilfully swindling monies from the disabled.

Plaintiff was discriminated against and taken advantage of because of his disability.

Relief From The Court

WHEREFORE, the plaintiff requests the sum of $500,000.00, plus triple damages. legal fees and costs

pursuant to the Massachusetts General Laws chapter 93A and any other relief the court deems appropriate.

/s/ Fred Davis
Fred Davis, Plaintiff
P.O. Box 721
Everett, Ma 02149
(617) 322 8223

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS DEDHAM SUPERIOR COURT
Civil No. 97-01716

FRED DAVIS,
Plaintiff

v.

HANOVER INSURANCE COMPANY,
Defendant

DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

AND

MOTION FOR SANCTIONS

Now comes the defendant, Hanover Insurance Company (hereinafter, "Hanover"), and moves this Honorable Court to dismiss the entirety of the complaint of Fred Davis (hereinafter, "Davis"), pursuant to Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure.

Hanover further moves that this Court impose sanctions against Davis in the nature of an award of all of Hanover's expenses in defending this series of frivolous suits; and in the nature of a temporary and then permanent injunction restraining Davis from filing any further suits against Hanover, its agents or employees or attorneys relating to the same or similar subject matter.

AND IN SUPPORT HEREOF, Hanover states as follows:

1. This complaint should be dismissed on principles of res judicata (including both claim preclusion and issue preclusion), all as argued in the accompanying Memorandum of Law, the contents of which are incorporated herein by reference;

2. Any Counts in Davis' complaint purporting to allege violations of M.G.L. c. 93A must be dismissed for failure of Davis to prove the presentation of a 30-day demand letter, which is required under the statute;

3. The sanctions being sought in this Motion are entirely appropriate, all as argued in the accompanying Memorandum, given the frivolous and vexatious nature of Davis' continuing complaints, all of which spring from the same series of events and/or transactions.

Dated: 9/29/97

/s/ George R. Suslak
Attorney for Defendant
George R. Suslak, Esquire
BBO #541921
STANTON & LANG
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940
(617) 595-1440

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 97-01716

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SANCTIONS

INTRODUCTION

On January 20, 1998, this case was before the court for hearing on the motion of the defendant, Hanover Insurance Company ("Hanover"), to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) and for sanctions pursuant to G.L. c. 231, § 6(f). In support of its motion, Hanover argues that the complaint must be dismissed because the plaintiff, Fred Davis ("Davis"), can prove no set of facts in support of his claim which would entitle him to relief; and thus, the complaint should be dismissed for failure to state a claim.

In his opposition, Davis argues that Hanover's motion should be stricken because (1) it does not comply with rule 9A and 9C; (2) it is brought in bad faith and with actual intent to deceive and defraud the court; (3) it is a continuing attempt to financially exploit him; (4) it is brought with the intention to deprive him of his rights under the United States and Massachusetts Constitutions; and, (5) it is brought to hurt and harm him.

For the reasons set forth below, the defendant's motion to dismiss will be **ALLOWED.**

BACKGROUND

This matter stems from an automobile accident which allegedly occurred on February 11, 1987.[1] Taking the facts in the light most favorable to Davis, they are as follows: Davis is a partially disabled senior citizen residing in Malden, Massachusetts. Hanover is an Insurance Company with an office in Braintree, Massachusetts.

On or about January 18, 1990, Davis filed a complaint in the Suffolk Superior court against Anthony Lauria ("Lauria"), the driver of a vehicle involved in the accident referred to above. At that time, Hanover was the insurer for Lauria. On February 12, 1991, the matter was remanded to the Boston Municipal Court ("BMC") and a trial was scheduled for October 9, 1991. On October 9, 1991, however, the case was reported settled and an order entered that the case would be dismissed as to all claims on November 12, 1991, unless the parties filed an agreement for judgment. Because no agreement for judgment was filed, the case was dismissed, as ordered, on November 12, 1991.

Sometime in 1991, however, a settlement was reached between Davis and Hanover in the amount of $20,000.00. Before the settlement was final, Davis' previous lawyer in this case, Stuart Ravech, served the parties with a notice

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[1] For a complete understanding of this decision, the court recites the lengthy procedural history gleaned from the record in this case.

of an attorney's lien. As a result, Hanover insisted that any settlement include the name of Stuart Ravech.

In 1993, Davis filed a lawsuit in Norfolk Superior Court against Hanover to collect the entire $20,000.00 settlement amount. In that complaint Davis alleged that Hanover breached its contract with him, engaged in unfair and deceptive business practices within the meaning of G.L. c. 93A, tried to cheat him out of money due to him, and acted in a manner designed to harass, hurt and harm him. At that time, Hanover again offered to pay Davis the settlement amount of $20,000.00 subject to an attorney's lien filed by Stuart Ravech; and, filed a counter claim against Davis seeking declaratory and injunctive relief. Subsequently, Hanover filed a motion for summary judgment. The motion was allowed in its totality.

Davis then attempted to appeal the matter to the Massachusetts Appeals Court. However, the Superior Court record could not be assembled because Hanover's counterclaim had not been resolved. Subsequently, Hanover voluntarily dismissed its counterclaim. On June 14, 1996, the Appeals Court affirmed the judgment of the Superior Court.

At that point, Davis sought further appellate review by the Supreme Judicial Court, which was denied on July 24, 1996.

Next Davis filed a petition for writ of certiorari with the United States Supreme Court, which was denied on January 6, 1997. A motion for rehearing, was denied by the United States Supreme Court on February 18, 1997.

On August 16, 1996, and while his original action was pending in the Norfolk Superior Court, Davis filed a complaint against Hanover and its Chairman of the Board, John F. O'Brien, in the United States District Court for the District of Massachusetts. This complaint sought injunctive and monetary relief stemming from alleged violations of state and federal constitutional rights as a result of Hanover's insistence that Davis' settlement was subject to the attorney's lien. On Hanover's motion, the U.S. District Court for the District of Massachusetts dismissed the complaint on May 17, 1996.

Davis then appealed the matter to the First Circuit Court of Appeals. On October, 11, 1996, that court affirmed the District Court judgment.

Davis next sought certiorari of the decision to the United States Supreme Court, which was denied on March 3, 1997. A motion for rehearing was subsequently denied by that court.

On May 7, 1997, Davis filed a motion for scheduling a trial date in the BMC with regard to the matter that was dismissed by that court on November 12, 1996. The motion was denied.

Subsequently Davis retransferred the matter to the Suffolk Superior Court. On Hanover's motion, that court vacated the retransfer.

On September 8, 1997, Davis filed the instant complaint in which he alleges that Hanover engaged in acts of unfair and deceptive business practices within the meaning of G.L. c. 93A, engaged in acts designed to

financially exploit him, and engaged in acts against the disabled in violation of G.L. c. 19A, § 14.

DISCUSSION

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12 (b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inferences which can be drawn therefrom in the plaintiff's favor. *Fairney v. Savogran Co.*, 422 Mass. 469, 470 (1996); *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991) and cases cited. A complaint is not subject to dismissal if it would support relief on any theory of law. *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979). All inferences should be drawn in the plaintiff's favor "so as to do substantial justice." *Ourfalian v. Aro Mfg. Co.*, 31 Mass. App. Ct. 294, 296 (1991). Thus, "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief." *Nader v. Citron*, 372 Mass. 96, 98 (1977).

After careful examination of the present complaint, this court finds that the instant action is substantially identical to the complaint brought by Davis, docket #93-00575, on March 10, 1993. Thus, based on the doctrine of Res Judicata, the complaint must fail as to all counts.

The doctrine of res judicata encompasses the doctrines of claim and issue preclusion. See *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). The applicable doctrine in this case, the doctrine of claim preclusion, makes a

valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action. See *Heacock*, 402 Mass. at 23, citing, *Franklin v. North Weymouth Co-op Bank*, 283 Mass. 275, 279-80 (1933), and cases cited. This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies. See *Mackintosh v. Chambers* 285 Mass. 594, 596-97 (1934) and cases cited. Restatement (Second) of Judgments § 25 (1980). The claim is the same for res judicata purposes if it is derived from the same transaction or series of connected transactions. *Saint Louis v. Baystate Med. Center, Inc.*, 30 Mass. App. Ct. 393, 399 (1991), citing, *Boyd v. Jamaica Plain Co-op Bank*, 7 Mass. App. Ct. 153, 163-64 (1979). The doctrine is a ramification of the policy considerations that underlie the rule against splitting a cause of action, and is based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit. *Foster v. Evans* 384 Mass. 687, 696 (1981). It is settled that a summary judgment entered, as was the one in the first action, will have preclusive effect. *Fluhr v. Allstate Ins. Co.*, 15 Mass. App. Ct. 983, 984 (1983).

Clearly, the doctrine of res judicata, or claim preclusion, applies here where both actions are based on the same claim, the matter was decided on summary judgment against Davis and he had the incentive and the opportunity to fully litigate the matter at that time.

The instant complaint describes the same claims which were at the core of the first action, namely, that

Hanover engaged in unfair and deceptive business practices within the meaning of G.L. c. 93A, and engaged in acts designed to financially exploit him.

The claims that Hanover "violated crimes against the disabled by knowingly and willfully swindling monies from the disabled," and that Davis was "discriminated against and taken advantage of because of his disability," are both derived of the same transaction, namely, the failure of Hanover to pay to Davis the entire $20,000.00 settlement amount without accounting for the attorney's lien. There is nothing in the instant complaint that Davis did not bring, or could not have brought, in the previous action. Thus, this court finds that Davis cannot now resuscitate, before this court, a claim that he brought, or could have brought, in the earlier proceedings in the Norfolk Superior Court docket #93-00574. Indeed, "public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and, that matters one [sic] tried shall be considered forever settled as between the parties." See *Wright Mach. Corp. v. Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974), quoting, *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

With regard to the motions of the plaintiff and the defendant for sanctions, no sanctions will be imposed at this time. However, the plaintiff has had full consideration of his complaint. Should the plaintiff, Fred Davis, bring another duplicative complaint against this defendant, Hanover Insurance Company, sanctions should be considered at that time.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the motion of the defendant, Hanover Insurance Company, to dismiss be **ALLOWED**. The defendants motion pursuant to G.L. c. 231, § 6(f) for sanctions is **DENIED**. The motion of the plaintiff, Fred Davis, for sanctions is **DENIED**.

/s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Court

A TRUE COPY

Attest: /s/ May A. Packer 3/13/98
Deputy Assistant Clerk

Dated: March 10, 1998.